In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 591

PACIFIC NATIONAL BANK OF SAN FRANCISCO, a national banking association, et al.,
Petitioners,

vs.

MERCED IRRIGATION DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
SUPPORTING BRIEF.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision (R. 1063) of the Circuit Court of Appeals for the Ninth Circuit made in the above en-

titled cause on September 5, 1940, which affirms the decision of the District Court for the Southern District of California, Northern Division, rendered against Petitioners on February 21, 1939 (R. 220).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent, Merced Irrigation District, a California irrigation district, for readjustment of its debts under what is now Chapter IX of the Bankruptcy Act of 1898, as amended (11 USC, §§ 401-404). The trial court rendered an interlocutory decree confirming the plan, and its decision was affirmed by the court below.

Our view of the case, briefly stated.

Stated as briefly as possible, our view of the case is this: The District's bonded debt (including five years' unpaid interest) is, according to its records, $21,148,706.28. Its other debts are inconsiderable.

The plan proposes to scale down the bonded debt to $8,338,011, by paying 51.501¢ on the dollar of principal, and nothing for accrued interest.

The plan follows the terms of a loan, in 1934, by the Reconstruction Finance Corporation (hereinafter referred to as R. F. C.) made to the District, designed to pay the amount offered by the plan, and conditioned on surrender of 85% of the bonds on those terms.

Although the trial court found that the plan is "fair, equitable and for the best interests of its credi-

tors", it made no finding (nor did the court below) concerning the value of the District's corporate assets, or the value of the privately owned lands charged with payment of the bonds, or the past, present or future income of the District, whether actual or potential.

We believe that the evidence establishes the following propositions:

(1) The present value of the District's corporate assets (acquired almost entirely with the proceeds of the bonds), as shown by its records, is $21,319,901.26.

These assets include a large hydro-electric plant and one of the largest dams in the world. The District estimates the life of the dam and reservoir at one hundred years from 1926.

(2) The value of the privately owned lands in the District (charged with payment of the bonds) is in excess of $40,000,000, and is attributable largely to the existence of the irrigation system, paid for with the proceeds of the bonds.

(3) The average annual corporate income of the District during its entire life (i. e., since its creation in 1919) has been adequate to amortize, in thirty-five years at 4% (the term of the refunding bonds proposed by the plan), a debt approximately twice the amount offered by the plan.

(4) No evidence suggests that the District's future income will be less than its past income. On the contrary, substantial considerations indicate that future income will much exceed the income of the past. For example:

(a) An important part of the District's revenue comes from the sale of the electricity generated to a private power company, under a contract expiring in 1964 R. 945-6). The amount received for power varies directly with the amount produced, which in turn varies with rainfall. Past operation of the hydro-electric plant (completed late in 1926) includes the lowest consecutive nine years of rainfall in the history of the District so far as existing records (available since 1870) show.

(b) The District's past life includes an unprecedented depression in agricultural prices, which in 1932 fell to 44 per cent. of the 1909-14 average, which period is generally accepted as a base.

(c) During much of its past life the District has been in process of development, much new land being gradually brought under cultivation, and much experience gained in adaptation of particular crops to particular locations. General prices and agricultural prices have, for several years now, exceeded the 1909-14 average.

The powers and duties of California irrigation districts.

Space does not permit detailed treatment; but the following quotation from a decision of the Supreme Court of California states briefly the basic provisions of the California statutes governing irrigation districts:

"The basic provision indicating the normal remedy of the bondholders is section 33 of the act, which read prior to 1935: 'Said bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district; and all the land within the district shall be and remain liable to be assessed for such payments as hereinafter provided.' Section 39 provides that the directors shall levy an assessment upon the lands in an amount sufficient to raise the interest and principal coming due on the bonds. The assessment is a lien against the property assessed (sec. 40), and upon delinquency, the property must be sold to the district (sec. 43). It may be redeemed within three years or at any time thereafter before a deed has been delivered (sec. 47)."

Provident Land Corp. v. Zumwalt, 12 Cal. (2d) 365, 370.

The issue of fairness is not disposed of by the findings or the opinions below.

The trial Court found, simply in the language of the statute:

"That the plan of composition as offered by the petitioner herein is fair, equitable and for the best interests of its creditors * * *" (R. 214).

But the trial Court's opinion reads in part:

"We consider as most forceful, irrefutable evidence of the fairness of the plan the indisputable fact that more than 90 per cent. of the invested capital in the bonds of the District has taken advantage of it. The legal requirement of debt com-

> position under Chapter IX of the Bankruptcy Act has been exceeded by nearly 25 per cent. of the affected invested capital" (R. 176).

And as this Court held in

> *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 114,

the statute there involved (Section 77B of the Act) laid down two requirements, namely (a) that a given percentage of creditors must consent to the plan, and (b) that the judge should not approve the plan unless satisfied that it is "fair and equitable".

The present statute, in substantially identical language, also imposes these two requirements.

It is, we submit, proper to refer to the trial Court's opinion where, as here, the opinion demonstrates that the court based a finding largely on irrevelant evidence. See:

> *American Propeller & Mfg. Co. v. U. S.*, 300 U. S. 475, 479;
>
> *Los Angeles Gas & Electric Co. v. Railroad Commission*, 289 U. S. 287, 320.

The opinion, moreover, is incorporated into the findings (R. 210).

Such a finding will not sustain the decree: On appeal the Court either orders a new trial or itself examines the evidence, makes a finding one way or the other, and affirms or reverses accordingly:

> *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 316, 317, 322.

See also, for example,

Saari v. Wells Fargo Express Co., 109 Wash. 415,

where the Court said:

> "In cases tried by the court, we ordinarily consider that improper and incompetent evidence is given no prejudicial weight or credence, but here the contrary affirmatively appears. The report of Benjamin to the police department was improperly admitted, and was given undue weight and improper analysis by the trial court."

Metropolitan State Bank v. McNutt, 73 Colo. 291:

> "The general rule that it is presumed that the court considered only competent evidence cannot be applied here, because it is shown by the bill of exceptions that the court rested its conclusions on evidence which is not competent on the issue in question."

See also,

In re Welsh, 5 F. (2d) 918.

The finding that the plan is "fair and equitable" is a mere conclusion of law.

The decision of this Court in

Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, and

Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 113,

make it clear that a finding that a plan is "fair, equitable and for the best interests of creditors" is

a mere conclusion of law, which must be based on findings of ultimate facts sufficient to support it.

A very similar problem is presented in California by a statute providing that specific performance shall not be granted unless the contract is fair and reasonable and supported by adequate consideration. Under this statute the courts hold that a finding, merely in the language of the statute, will not support a judgment, since to hold such a finding sufficient would confer on the trial courts unlimited power to follow their individual ideas concerning the content of the requirement of fairness. Thus, in

Miller v. Gusta, 103 Cal. App. 32,

the Court said:

> "* * * the trial court instead of finding the facts from which the justness and reasonableness of the contract and the adequacy of the consideration would follow as a conclusion of law simply found 'that said contract is fair and equitable and that the consideration * * * is an adequate consideration'. Under the authorities above quoted this is a bald conclusion of law. It is impossible from this finding for this court to know on appeal what value the court put on any of the properties involved in the exchange. Nor can we even conjecture in view of the sharp conflict in the testimony what values the trial court may have had in mind, or what sort of contract in the trial judge's opinion would be fair and equitable or what consideration adequate. The values might, if they had been found by the trial court, be so disproportionate as to lead this court to disagree with the trial court's conclusion as to the fairness

of the contract and the adequacy of the consideration. As to that we are left in the dark."

The opinions below do not supply the lack of findings on the fairness of the plan.

Even assuming that the insufficiency of the finding on the issue of fairness might be supplied by what is said or implied in the opinion of the trial Court, the fact is that its opinion contains nothing which could do so.

Treatment of fairness in trial court's opinion.

The trial Court's opinion contains the following matter relevant to the question of fairness:

The Court expresses its belief in the "inability of the District to service the outstanding bonds under the applicable laws of the State of California" (R. 169).

It states that the District was saved from collapse by the R. F. C. loan of 1934 (R. 174), because

> "at the time default occurred in the bonds in 1933 the land of the District as a whole did not and could not be made to pay its cost of operation and consequently the land owners were unable to pay the assessments to service the bonds. This condition of delinquency continued and even became more aggravated by pyramiding unpaid assessments under applicable state laws year after year, until shortly prior to the availability of the plan embodied in the petition now before this court it had reached an aggregate delinquency of 62 per cent" (R. 175).

(We later show that the primary difficulty with this District resulted from wide fluctuations of income, coupled with the inexorable requirement of the statute (since amended to remove the difficulty), that the District shall levy assessments each year sufficient to meet current requirements plus all past defaults.)

The Court then states our contention that the District can easily pay much more than is offered by the plan. The Court answers with two propositions: First, that

> "it was the more than 90 per cent. of the bondholders who took advantage of the R. F. C. composition agreement and transaction which made it possible for the District to save itself from financial ruin and thereby to a major degree brought about the present fiscal situation which the records in evidence show exists in the District." (R. 176.)

Secondly, the court states that the large proportion of bondholders who have accepted the offer of 51.501¢ on the dollar is "forceful, irrefutable evidence of the fairness of the plan" (R. 176).

The court then mentions a proposal by these petitioners of a modified plan, and holds that it is inadmissible because it would give an undue advantage to these petitioners as compared with the 90 per cent. of bondholders who irrevocably accepted 51¢ on the dollar (R. 176), and also because our proposed modification, if adopted, would upset the District's relations with the R. F. C., which cannot be compelled

to change its contract with the District. In this behalf the Court says that our proposal

> "would jeopardize if not injuriously upset present and prospective necessary improvements in the District, throw its entire contractual arrangement with the Reconstruction Finance Corporation into uncertainty, and encourage unjustifiable delay in the adjustment and settlement of the financial status of the District. The R. F. C. has signified no willingness to advance more money to the retirement of the bonds than it has under the contract already made, and it cannot be required to do so by this court. We cannot alter the agreement under which the District and all financially interested in it were saved from forced liquidation which would have caused greater loss than the bond investors are to take under the plan." (R. 178.)

We had argued (and do so again later) that the revenue of the District from sale of electric power is a very important factor to be taken into account in considering the District's ability to pay. The Court rejects this contention on the ground that power revenue, being dependent in amount upon rainfall, is not a safe basis for estimating future revenue. In this connection the Court says that

> "the experiences of the past, as shown by the record before us, do not warrant a finding that power revenue conditions similar to those existing will continue in the future, and it would be injudicious to venture the further financial ability of the District to meet its obligations upon

problematical water sources or conditions. This would be too dubious a situation to warrant adoption by the court." (R. 178-9.)

Treatment of fairness by the Circuit Court of Appeals.

The Court below (the Circuit Court of Appeals) has little to say on the question of the factual fairness of the plan.

The Court says that the District was in serious distress in 1932 and that "some plan had to be worked out to refinance if anything at all were to be salvaged on the bonds" (R. 1058). The Court then says concerning the ability of the District to pay, that certain of our arguments are "illustrative of the truth of the statement of the District in its brief, 'there is no yardstick that can measure the ability to pay with certainty' " (R. 1059). The Court then quotes from the trial Court's opinion where the latter Court argued that the present condition of the District is attributable to the surrender of over 90 per cent. of the bonds in the past (R. 1059). The Court then refers in general terms to the evidence of fairness put forward by the District, and says (without any analysis) that this evidence supports the conclusion that the plan is fair and equitable (R. 1060).

Summary of action of the Courts below concerning fairness.

The fact is, then, that neither the findings nor either of the opinions arrive at any conclusion whatever as to the value of the District's corporate properties, or the value of the lands charged with payment of the bonds, or the past income of the District as evidencing ability to pay, or the potential ability of the District to pay, whether present or future. We submit, therefore, that the decision cannot stand unless this Court, upon examination of the evidence, should find that the ultimate facts support the conclusion of law that the plan is fair, equitable and for the best interests of the creditors.

The other questions presented are discussed in the brief attached hereto.

OPINIONS BELOW.

Opinion of the trial Court: R. 168, 25 F. Supp. 981.

Opinion of the Circuit Court of Appeals: R. 1015, 114 F. (2d) 654.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 5, 1940 (R. 1062). A petition for rehearing was filed October 3, 1940 (R. 1064), and was duly entertained and denied October 15, 1940 (R. 1064). The mandate has been stayed until forty

days after October 15, 1940, and thereafter until disposition of the matter by this Court (R. 1065).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. §347(a)).

QUESTIONS PRESENTED.

1. Is a plan of composition fair under the Municipal Bankruptcy Statute which offers less than half the amount due (as this one does), when the security behind the debt greatly exceeds the amount offered, and when the income of the debtor is sufficient to pay much more than the amount offered by the plan?

2. Was it error, as we contend, to hold the plan fair without making any finding, or expressing any opinion, concerning the value of the District's corporate assets, or the value of the privately owned lands charged with payment of the bonds, or the past, present or future income of the District, whether actual or potential?

3. Was it error, as we contend, to hold the plan fair on the grounds (expressed in the opinions) (a) that some relief was necessary in 1933; (b) that the surrender to R. F. C. of 90 per cent of the bonds (in 1935) greatly relieved the situation, and was largely the cause of the District's present ability to pay; (c) that the proportion of bonds surrendered is "irrefutable evidence" that the plan is fair; (d) that no modification of the plan is feasible, because the Court

should not disturb the R. F. C. contract, and cannot alter it?

Present ability to pay is not determined, but the opinions indicate that both Courts below believed the District could pay more than it offers (R. 176, 1059).

4. Is it *res judicata,* as we contend, that the relief here sought cannot be granted? An earlier proceeding under the first Municipal Bankruptcy Act between these parties presented the identical plan now presented for confirmation. After the decision of *Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513, these petitioners moved to reverse the judgment on the authority of that decision, which motion was granted. We submit that the identical right now asserted by the District was adjudicated upon in the prior proceeding. The Courts below held the contrary.

5. The R. F. C. loan contract exacted a pledge of the District's power revenue as security for its loan. Does this circumstance place the R. F. C. in a different class of creditors from the objecting bondholders, as we contend, so as to make it improper to count the R. F. C.'s consent against them? No bondholder, other than the R. F. C., consented to the plan.

6. Was it proper to count the R. F. C.'s consent against the objecting bondholders, considering that the R. F. C. is satisfied with the plan because the plan gives it all that it is entitled to in any event, and considering that any modification of the plan in favor of the objecting bondholders would be undesirable from the point of view of the R. F. C.?

7. Is the entire amount of the bonds held by the R. F. C. owing by the District, or are they simply held by the R. F. C. as security for its loan of less than half the amount otherwise due thereon, as we contend?

8. Is a plan fair which (as here) coerces consent by informing the creditor that if he questions the offer he will not receive any interest on the amount offered, during such number of years it may take to litigate the fairness of the offer in question?

It should be observed that the plan contemplated payment by the District of 4% interest on the aggregate amount of the offer, because the plan contemplated the borrowing of the aggregate amount offered from the R. F. C. at 4%, and something over 80% of it was, in fact, so borrowed, and paid to consenting bondholders, in 1935.

9. Does a proceeding under a state reorganization statute, pending when this action was commenced and still pending, designed to effectuate the identical plan here involved, oust the federal courts of jurisdiction?

10. Does the bankruptcy act confer jurisdiction of this proceeding, considering that the Supreme Court of California has recently held that the functions of irrigation districts are exclusively governmental?

REASONS FOR ALLOWANCE OF THE WRIT.

(1) We respectfully submit that this Court should settle the meaning of the requirement, in the municipal bankruptcy provisions, that the plan shall be "fair, equitable and for the best interests of the creditors".

(a) The situation is not identical with the situation presented by the provisions of Chapter X, disposed of by this Court in *Case v. Los Angeles Lumber Products Co.,* 308 U. S. 106.

(b) The opinions below disclosed the fact that term "fair and equitable" was taken merely in its popular sense; and the conclusion is an unanalyzed, and, to a degree, inarticulate, judicial reaction to the mass of evidence as a whole. The courts take no account of (and made no findings concerning) the value of the District's corporate properties, or the value of the privately owned lands charged with the bonds, or the past income of the District as evidence of ability to pay, or the potential ability of the District to pay, whether present or future.

(c) So far as the conclusion reached below (that the plan is fair) is based on formulated premises, it is rested on improper grounds, namely the following:

1. That some relief was necessary in 1933 (five years before this action was commenced) (R. 174, 1058);

2. That the surrender to the R. F. C. of 80 per cent of the bonds in 1935 greatly relieved the District's situation (R. 175, 1059);

3. That the District's present ability to pay (not determined) is largely the result of the R. F. C. loan and the surrender of bonds thereunder (R. 176, 178, 1059);

4. That the proportion of bonds surrendered (largely in 1935) is irrefutable evidence that the plan is fair (R. 176);

5. That no modification of the plan is feasible because the court should not disturb the R. F. C.'s contract, and cannot alter it (R. 178);

6. That but for the plan, the bonds would be worth less than is offered by the plan (R. 176, 1059-60).

(2) This Court should determine, we submit, that a State seeking bankruptcy relief must provide means for effectuating the statutory requirement that the plan be fair.

The municipal bankruptcy provisions are described by this Court as providing for cooperation between State and Nation.

United States v. Bekins, 304 U. S. 27, 53, 54.

The statute requires plans to be fair, equitable and for the best interest of creditors.

We submit that the State's part of the cooperative venture includes the duty of providing means for effectuating the requirement of fairness.

The opinions below show, we submit, that the plan was confirmed on the assumption (erroneous, we believe), that unless existing California statutes provide means for giving creditors the benefit of the District's property and income, this plan may be confirmed even though the court believes (a) that the District's corporate properties, and the private property charged with the bonds, each exceeds the total debts sought to be scaled down, and (b) that the District's average income is sufficient to pay far more than is offered by the plan.

It should not be held, we submit, that a State may demand and receive approval of a plan cutting debts in half on the ground that although the debtor could pay much more, the State has not provided means for enabling it to do so.

(3) The statute here involved provides (Sec. 82) that any agency of the United States holding securities under contract with any petitioner shall "be deemed a creditor in the amount of the full face value thereof". Here (as in doubtless other cases), although the R. F. C.'s contract rights are only those of a pledgee (as we submit), and although its status as such was fixed years before the statute was passed, nevertheless it is held below that the District is to be treated as owing the entire amount of the bonds pledged for a debt less than half the amount of the bonds.

We submit that the meaning of this provision should be determined by this Court.

(4) Section 83(j) of the statute was enacted after this proceeding was commenced. It is nevertheless held below to have changed the substantive relation between the R. F. C. and the District, as well as the rights of these petitioners.

We submit that if this statute is to be treated as thus retrospective, that fact should be determined by this Court.

(5) This plan (as doubtless many others) proposes that the District borrow money at 4% to discharge its debts (for less than half the amount due) in cash. The objecting bondholders have been litigating the fairness of the plan for years. The plan and the decree nevertheless propose to pay them the amount of the original cash offer without any interest. We submit that such a plan is unfair and that this Court should so determine.

(6) Prior to the enactment of the statute upon which this proceeding rests, an action was commenced by the District against these petitioners under a state refinancing statute seeking the identical relief which is sought here. In this proceeding we pleaded that action in bar.

We know of no decision of this Court determining the effect of the passage of a new bankruptcy act upon pending state proceedings under state laws. We submit that the question should be settled.

WHEREFORE, Petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Hon-

orable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 9242, West Coast Life Insurance Company, a corporation, Pacific National Bank of San Francisco, a national banking association, et al., Appellants, v. Merced Irrigation District, Appellee", and that the decree of said Court be reversed by this Court with directions to dismiss the bill, and for such other relief as to this Court may seem proper.

Dated, San Francisco, California,
November 18, 1940.

Pacific National Bank of San Francisco, a national banking association,
Mary E. Morris,
R. D. Crowell,
Belle Crowell,
Minnie E. Rigby as Executrix and Richard tum Suden as Executor of the Last Will of William A. Lieber, Alias, Deceased,
Milo W. Bekins and Reed J. Bekins as trustees appointed by the Will of Martin Bekins, deceased,
Milo W. Bekins and Reed J. Bekins as trustees appointed by the Will of Katherine Bekins, deceased,
Reed J. Bekins,
Cooley Butler,

Chas. D. Bates,
Lucretia B. Bates,
Edna Bicknell Bagg,
John D. Bicknell Bagg,
Mary B. Cates,
Nancy Bagg Eastman,
Charles C. Bagg,
Horace B. Cates,
Barker T. Cates,
Mary Edna Cates Rose,
Mildred C. Stephens,
N. O. Bowman,
W. H. Heller,
Fannie M. Dole,
James Irvine,
J. C. Titus,
Sam J. Eva, William F. Booth, Jr., George N. Keyston, George W. Pracy, H. T. Harper and George B. Miller as trustees of Cogswell Polytechnical College,
Tulocay Cemetery Association, a corporation,
Percy Griffin,
Emogene Cowles Griffin,
D. Lyle Ghirardelli,
A. M. Kidd,
Grayson Dutton,
Stephen H. Chapman,
Edith O. Evans,
J. Ofelth,
Dante Muscio,
I. M. Green,
Julia Sunderland,
Lily Sunderland,
Florence S. Ray,
Joseph S. Ray,

Amelia Kingsbaker,
S. Lachman Company, a corporation,
Sue Lachman,
Sophia Mackenzie,
Nettie Mackenzie,
R. J. McMullen,
J. R. Mason,
Gilbert Moody,
William Payne,
G. H. Pearsall,
Sherman Stevens,
E. G. Soule,
Margaret B. Thomas,
Isabella Gillett and Effie Gillett Newton as executrices of the Estate of J. N. Gillett, deceased.
Theo. F. Theime,
Fletcher G. Flaherty,
Frances V. Wheeler,
Miriam H. Parker,
Apphia Vance Morgan,
First National Bank of Pomona,
George F. Covell,
Alma H. Woore,
George Habenicht,
Seth R. Talcott,
Adolf Aspegren,
J. H. Fine,
Mrs. J. H. Fine,
F. F. G. Harper,
W. S. Jewell,
Florence Moore,
American Trust Company as trustee under a certain agreement between R. S. Moore and American Trust Company dated December 15, 1927,

Crocker First National Bank as trustee under a certain agreement between Florence Moore and Crocker First Federal Trust Company, dated December 15, 1937.

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